

**BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION**

In the Matter of the Commission, on its own motion, seeking to establish guidelines for administration of the Nebraska Universal Service Fund.

Application No. NUSF-1

**POST-HEARING BRIEF OF UNITED TELEPHONE  
COMPANY OF THE WEST d/b/a EMBARQ**

1. United Telephone Company of the West d/b/a Embarq hereby files its Post-Hearing Brief in this matter. Nebraska law authorizes the Commission to require interconnected VoIP providers to contribute to the NUSF and there is no federal law barring the Commission from doing so. Embarq urges the Commission to require interconnected VoIP providers to contribute to the Nebraska Universal Service Fund.

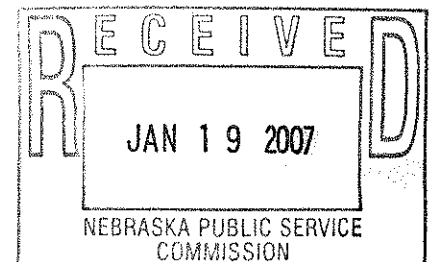
**ARGUMENT**

**A. Nebraska Law Mandates that the Commission Require Interconnected VoIP Providers to Contribute to the NUSF**

2. Plainly stated, an interconnected VoIP provider is a telecommunications company as defined by Nebraska law and therefore must contribute to the NUSF. Nebraska law commands that the Commission “shall require every telecommunications company to contribute to any universal service mechanism established by the Commission pursuant to state law.”<sup>1</sup> Thus, for the Commission to require interconnected VoIP providers to contribute to the NUSF, it must be shown that they provide telecommunications within the meaning the Nebraska law.

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<sup>1</sup> *Neb. Rev. Stat. § 86-324(2)(d)(emphasis added).*



3. The terms “telecommunications company,” “telecommunications service,” and “telecommunications” are defined by Nebraska law. Those definitions, when read together, place interconnected VoIP providers squarely under the jurisdiction of the Commission for purposes of the NUSF. First, the term “telecommunications company” is defined as:

[A]ny natural person, firm, partnership, limited liability company, corporation, or association offering telecommunications service for hire in Nebraska intrastate commerce without regard to whether such company holds a certificate of convenience and necessity as a telecommunications common carrier or a permit as a telecommunications contract carrier from the commission.<sup>2</sup>

In turn, Nebraska law defines “telecommunications service” as “the offering of telecommunications for a fee,”<sup>3</sup> and “telecommunications” is defined as “the transmission, between or among points specified by the subscriber, of information of the subscriber's choosing, without a change in the form or content of the information as sent or received.”<sup>4</sup> These definitions, read together, compel the Commission to require interconnected VoIP providers to contribute to the NUSF.

**B. The Commission's Analysis in NUSF-40 Applies with Equal Force to Interconnected VoIP as it does to Facilities-Based VoIP**

4. Commission precedent also supports requiring interconnected VoIP providers to contribute to the NUSF. The Commission concluded in NUSF-40 that facilities-based VoIP service is “telecommunications” that is subject to NUSF contribution requirements.<sup>5</sup> In doing so, the Commission relied on the definitions in the NUSF statutes and Commission rules, as outlined above, and the federal Telecommunications Act. Ultimately, the Commission's decision to require facilities-based VoIP providers to contribute to the NUSF rested on the definition of

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<sup>2</sup> Neb. Rev. Stat. § 86-322 (*emphasis added*).

<sup>3</sup> Neb. Rev. Stat. § 86-121.

<sup>4</sup> Neb. Rev. Stat. § 86-117; *see also*, Neb. Admin. Code Title 291, Chapter 10, § 001.01V.

<sup>5</sup> *See Application No. NUSF-40 / PI-68, Findings and Conclusions* (March 22, 2005) (“NUSF-40 Order”).

“telecommunications” in section 153(43) of the Telecommunications Act of 1996.<sup>6</sup> Section 153(43) states that telecommunications is “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.”

5. The Commission first determined that “facilities-based VoIP providers do transmit information of the user’s choosing between points specified by the users.”<sup>7</sup> The Commission then found that the “form or content” of the information did not change when sent by facilities-based VoIP providers to users.<sup>8</sup> As a result, the Commission required that facilities-based VoIP providers contribute to the NUSF.

6. For purposes of review under the NUSF statutes and rules, and federal law, the manner in which interconnected VoIP and facilities-based VoIP services are provided is substantially similar, if not identical. Whether a VoIP provider owns the network or leases it (as is the case with interconnected VoIP), that provider (a) transmits information of the user’s choosing between points specified by the users and (b) does so without change in the form or content of the information as sent and received. Therefore, under the statutes and rules already relied upon by the Commission in NUSF-40 to require facilities-based VoIP providers to contribute to the NUSF, interconnected VoIP providers must likewise be required to contribute.

**C. The Few Arguments Made by Other Parties that the Commission is Preempted by Federal Law from Requiring Interconnected VoIP Providers to Contribute to the NUSF are Unpersuasive**

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<sup>6</sup> The Commission noted that the federal definition of telecommunications is essentially identical to that provided in Neb. Admin. Code, Title 291, Chapter 10, § 001.01V. See *NUSF-40 Order*, at ¶ 43.

<sup>7</sup> See *NUSF-40 Order*, at ¶ 44.

<sup>8</sup> See *NUSF-40 Order*, at ¶ 45.

7. Time Warner Cable's argument that this Commission has not identified any ancillary jurisdiction that would authorize it to require interconnected VoIP providers to contribute to the NUSF is not availing.<sup>9</sup> The Commission need not rely on any ancillary jurisdiction. It need only look to Nebraska law for authority, so long as there is no conflicting federal law. There is nothing in the FCC's orders or in federal law that conflicts with the explicit authority granted to the Commission by Nebraska law. And not surprisingly Time Warner fails to offer an FCC order or provision in federal law to corroborate its claim. In addition, Time Warner acknowledges the important public policies underlying the NUSF and contributes to the fund despite the absence of a Commission requirement that it do so for interconnected VoIP services.

8. Level 3 similarly fails in its claim that the *Vonage Preemption Order*<sup>10</sup> precludes the Commission from imposing NUSF contribution requirements on interconnected VoIP providers. The FCC itself stated in the *Contribution Order* that its decision in the *Vonage Preemption Order* was "not in conflict or otherwise inconsistent with any other provision of the Act."<sup>11</sup> The FCC explained its decision in the *Vonage Preemption Order*, stating:

We do not, however, believe that this policy statement precludes us from adopting universal service contribution rules for interconnected VoIP providers here. We note that the Commission's discussion of section 230 in the *Vonage Order* as cautioning against regulation was limited to "traditional common carrier economic regulations."<sup>12</sup>

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<sup>9</sup> See *Comments of Time Warner*, at p. 11.

<sup>10</sup> See *Testimony of Greg L. Rogers*, citing *In re Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minn. Pub. Util. Comm'n*, WC Docket No. 03-211, FCC 04-267 (FCC rel. Nov. 12, 2004).

<sup>11</sup> *In the Matter of Universal Service Contribution Methodology*, WC Docket No. 06-122, FCC 06-94, footnote 166 (FCC rel. June 27, 2006).

<sup>12</sup> *Id.*, citing *Vonage Order*, 19 FCC Rcd at 22426, para. 35.

As noted by Ms. Prockish in her testimony before the Nebraska Commission at hearing, the FCC was “discussing service type common carrier regulations such as rate averaging and filing of price lists or tariffs, but not the imposition of surcharges for [public] benefit.”<sup>13</sup> The NUSF is not a “traditional common carrier economic regulation” and therefore the Commission is not preempted from requiring interconnected VoIP providers from contributing to it.

9. That there is no preemption of state universal service contribution rules is also supported by the FCC’s treatment of 911 funding obligations for VoIP providers. When the FCC adopted its *VoIP 911 Order*<sup>14</sup> imposing certain 911 service requirements on VoIP providers, it acknowledged that many states already required 911 funding contributions from interconnected VoIP providers. The FCC expressed no disapproval (let alone preemption) of that particular state-imposed regulatory requirement.<sup>15</sup> Just as there can be no serious opposition to requiring VoIP providers to contribute to 911 funding when VoIP providers benefit from their access to the 911 system,<sup>16</sup> there should be no serious opposition to requiring VoIP providers to contribute to state universal service mechanisms when VoIP providers benefit from access to the PSTN. In the *Contribution Order* the FCC recognized that all VoIP providers benefit from access to the PSTN and should contribute directly to the federal USF, regardless of how they interconnect with the PSTN, whether directly or through a third party.<sup>17</sup> Because there is no preemption, the Commission is free to require interconnected VoIP providers to contribute to the NUSF.

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<sup>13</sup> See Transcript, at p. 36.

<sup>14</sup> *IP-Enabled Services and E911 Requirements for IP-Enabled Service Providers*, WC Dockets No. 04-36 and 05-196, First Report and Order and Notice of Proposed Rulemaking, FCC 05-116, (Released June 3, 2005)

<sup>15</sup> *VoIP 911 Order*, ¶ 52.

<sup>16</sup> Even before the FCC ordered VoIP providers to implement an ANI, or pseudo-ANI, and an ALI-like “registered location” 911 solution, most major VoIP providers routed 911 calls to PSAPs over normal business lines and expected PSAPs to handle such calls as emergency calls.

<sup>17</sup> *Contribution Order*, at ¶¶ 36 & 48.

**D.     Embarq Supports the Utilization the Safe Harbor Established by the FCC in the *Contribution Order***

In the *Contribution Order*, the FCC created a safe harbor calculation of 64.9 percent interstate for the calculation of the FUSF surcharge for interconnected VoIP providers. The FCC also stated that interconnected VoIP providers could provide a traffic study with more precise calculations of interstate usage. Embarq supports either of these methods for determining the proper level of intrastate usage for purposes of the NUSF, so long as the methodology used to calculate NUSF contributions and FUSF contributions is the same. Therefore, if the FCC safe harbor is used, the methodology to calculate NUSF contributions for interconnected VoIP should be the inverse of the methodology used to calculate FUSF contributions.

**CONCLUSION**

10.     The Commission has authority under Nebraska law to require interconnecting VoIP providers to contribute to the NUSF and the Commission is not prohibited by federal law from imposing such a requirement. Embarq therefore supports the Commission's proposal to apply the inverse of the safe harbor that the FCC has applied to interconnecting VoIP providers or, in the alternative, to allow providers to develop a means to specifically determine the interstate/intrastate nature of calls.

Respectfully submitted this 19<sup>th</sup> day of January, 2007.

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the Post-Hearing Brief of United Telephone Company of the West d/b/a Embarq was sent via regular United States mail, postage prepaid, on this 19<sup>th</sup> day of January, 2007, addressed as shown below, to the following:

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